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AUG 30 1944
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 415

WALTER WANGER PICTURES, INC., a Corporation,

Petitioner,

vs.

ETHEL STRICKLAND ROGAN, as Executrix of the Estate of Nat Rogan, Deceased,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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ETHEL STRICKLAND ROGAN, as Executrix of the Estate of Nat Rogan, Deceased,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

To the Honorable the Supreme Court of the United States:

Walter Wanger Pictures, Inc., a corporation, prays that a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above case on June 26, 1944, reversing a decision of the District Court of the United States, in and for the Southern District of California, Central Division.

Opinions Below.

The memorandum decision, as well as the findings of fact and conclusions of law and judgment of the United States District Court, Southern District of California, Central Division, are unreported but are contained in the transcript of record, pages 64 to 82, inclusive. The opinion of the Circuit Court of Appeals is as yet unreported but is set forth in the record, pages 189 to 194, inclusive.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 26, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347).

Statutes Involved.

Relevant statutory provisions are Section 14(a) and Section 26(c)(2) of the Revenue Act of 1936, c. 690, 49 Stat. 1648.

Sec. 14. Surtax on Undistributed Profits.

(a) Definitions.—As used in this title—

(1) The term "adjusted net income" means the net income minus the sum of—

(A) The normal tax imposed by section 13.

(B) The credit provided in section 26(a), relating to interest on certain obligations of the United States and Government corporations.

(C) In the case of a holding company affiliate (as defined in section 2 of the Banking Act of 1933), the amount allowed as a credit under Section 26(d).

(D) In the case of a national mortgage association created under Title III of the National

Housing Act, the amount allowed as a credit under section 26(e).

(2) The term "undistributed net income" means the adjusted net income minus the sum of the dividends paid credit provided in section 27 and the credit provided in section 26(c), relating to contracts restricting dividends.

* * * * * * * *

Sec. 26. Credits of Corporations.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

* * * * * * * *

(c) Contracts Restricting Payment of Dividends.—

* * * * * * * *

(2) Disposition of profits of taxable year.—An amount equal to the portion of the earnings and profits of the taxable year which is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year) to be paid within the taxable year for the discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt; to the extent that such amount has been so paid or set aside. For the purposes of this paragraph, a requirement to pay or set aside an amount equal to a percentage of earnings and profits shall be considered a requirement to pay or set aside such percentage of earnings and profits. As used in this paragraph, the word "debt" does not include a debt incurred after April 30, 1936.

* * * * * * * *

Statement of Facts.

The action below is an appeal from the decision of the United States District Court, Southern District of California, Central Division, wherein judgment was entered on behalf of petitioner for the recovery of income tax for the years 1936 and 1937.

The petitoner reported a net income for 1936 of $92,-040.30 and paid the income tax due thereon of $21,546.86, and for the year 1937 reported a net income of $78,053.35 and paid the income tax due thereon of $24,386.60 [R. 68-70]. Thereafter petitioner was assessed and paid additional taxes for the year 1936 in the sum of $17,296.81 and respondent determined an overassessment for the year 1937 in the amount of $3,148.59. In the assessment of additional taxes for the year 1936 and in determining the overassessment for the year 1937, the respondent refused to allow to petitioner credits claimed by the latter under Section 26(c)(2) of the Revenue Act of 1936 [R. 71-73, 90, 92].

The District Court found that the petitioner was required to and actually did pay the sum of $82,522.57 in 1936 out of earnings of petitioner for the year 1936 to one of its debtors, in accordance with a written contract executed by petitioner prior to May 1, 1936, and that such amount so paid was not available for dividend payments in the year 1936, and pursuant to the provisions of Section 26(c)(2) of the Revenue Act of 1936 was entitled to a credit in the sum of $82,522.57. The District Court

also found petitioner paid, pursuant to the same written contract, during the year 1937, the sum of $12,186.10 out of earnings of petitioner for the year 1937 to its debtor, and this latter sum was also accordingly not available for dividends and should have also been allowed as a credit to petitoner [R. 73-74].

The District Court found the facts to be that on September 1, 1934, Jay Paley and Walter Wanger entered into an agreement in writing [attached to amended complaint as Exhibit "C", R. 17-33]; that after the execution of such agreement, they organized petitioner corporation which assumed their agreement, and pursuant thereto petitioner issued to Paley 3,500 shares of its preferred stock at $100.00 per share and 100 shares of its class "A" common stock for one dollar per share [R. 74-75].

Petitoner was organized for and did engage in the production of motion pictures, and after making and producing two motion pictures entitled "Private Worlds" and "The President Vanishes" Paley did, pursuant to the provisions of his contract of September 1, 1934, elect to withdraw from the corporation and made demand upon petitioner for the retirement of his stock in the amount of $350,000.00 and also for the repayment of $151,017.44 which he had loaned the petitioner. To comply with the demands made by Paley, an agreement was executed on March 18, 1935, between him and the petitioner which acknowledged the right of Paley to receive the sum of $501,017.44 [R. 36-37].

On March 18, 1935, the petitioner entered into a written assignment with the Bank of America National Trust and Savings Association, as trustee for Paley, whereby and wherein petitioner acknowledged its debt to Paley and did assign all its right, title, and interest in the two motion pictures entitled "Private Worlds" and "The President Vanishes" and all gross receipts received from the exhibition and distribution of said two pictures until Paley shall have been paid the full amount of his debt of $501,017.44 [R. 39-51].

The District Court found that under the written assignment of March 18, 1935, all earnings and profits derived from the release and distribution of the two pictures were paid to the bank in satisfaction of the debt due by petitioner to Paley and that such sums amounted to $82,522.57 for 1936 and $12,186.10 for 1937 [R. 76-77].

The District Court found that the sum of $82,522.57 paid by petitioner during the year 1936 to Paley and $12,186.10 paid by petitioner to Paley during the year 1937 represented earnings and profits of petitioner for said two years which petitioner was required by the provisions of the written contract executed on March 18, 1935, to pay within said years 1936 and 1937 in discharge of a debt [R. 77].

Decisions of District Court of the United States and United States Circuit Court of Appeals.

The District Court of the United States, Southern District of California, Central Division, rendered judgment on May 10, 1943, in favor of petitioner for $25,737.86, plus interest on the principal sum, being undistributed profits taxes for the years 1936 and 1937 [R. 81-82]. The District Court held and decided that petitioner did pay earnings and profits of both years 1936 and 1937 to a debtor and was entitled to credit therefor, pursuant to the provisions of Section 26(c)(2) of the Revenue Act of 1936, c. 690, 49 Stat. 1648 [R. 79-80]. The United States Circuit Court of Appeals for the Ninth Circuit reversed the decision aforesaid of the District Court.

Questions Presented.

1. Does the written assignment and subsequent payment of all proceeds derived from the distribution and release of two motion pictures expressly deal with the disposition of earnings and profits of the taxable year so as to entitle petitioner to a credit therefor in accordance with the provisions of Section 26(c)(2) of the Revenue Act of 1936?

2. Did the written assignment create a debt of the petitioner within the purview of Section 26(c)(2) of the Revenue Act of 1936?

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

(1) In deciding that the provisions of the written assignment failed to deal with and provide for the disposition of earnings and profits of the petitioner for the taxable years 1936 and 1937.

(2) In its failure to decide that the written assignment created a debt of petitioner within the meaning of Section 26(c)(2) of the Revenue Act of 1936.

(3) In reversing the decision of the United States District Court.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein is in conflict with the decisions of the Tax Court of the United States and the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Scofield, Collector of Internal Revenue v. Valley Pipe Line Company*, 138 Fed. (2d) 835.

2. The Circuit Court of Appeals has decided an important question of Federal tax law which has not been but should be settled by this Court.